

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 THE WAVE STUDIO, LLC,

5 Plaintiff(s),

6 -vs-

13 CV 9239 (CS) (VR)

DISCOVERY CONFERENCE

7 GENERAL HOTEL MANAGEMENT, LTD., et al.,

8 Defendant(s).
9 -----x

10 *Proceedings recorded via digital recording device*

11
12 United States Courthouse
13 White Plains, New York

14 Thursday, February 29, 2024

15 Before: THE HONORABLE VICTORIA REZNIK,
16 Magistrate Judge

17 A P P E A R A N C E S:

18 ROBINS KAPLAN, LLP
19 Attorneys for Plaintiff

20 BY: GABRIEL A. BERG
ROMAN SILVERFELD
ZACHARY COHEN

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22 Attorneys for Defendant American Airlines, Inc.
23 BY: HOWARD S. HOGAN

24 AKIN, GUMP, STRAUSS, HAUER & FELD, LLP
Attorneys for Defendant American Express Company
25 BY: ERICA E. HOLLAND
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1 A P P E A R A N C E S: (Continued...)

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Attorneys for Defendant British Airways
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Software, Southwest Airlines
6 BY: CARLA B. OAKLEY
MEAGHAN H. KENT

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8 NIXON PEABODY
Attorneys for Defendant Cathay Pacific Airways Ltd.
9 BY: ANDREW WEINTRAUB

10 STRIKOWSKY, DRACHMAN & SHAPIRO, PLLC
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12 BY: SIM R. SHAPIRO

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14 Despegar.com USA, Inc.
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21 BY ABIGAIL RAMORE

22 DAVIS, WRIGHT & TREMAINE, LLP
Attorneys for Defendant Groupon, Inc.
23 BY: JAMES E. ROSENFELD

24 ALLEN & OVERY, LLP
25 Attorneys for Defendant Qatar Airways
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1 A P P E A R A N C E S: (Continued...)

2
3 GOLDBERG SEGALLA, LLP
4 Attorneys for Defendant Setai Owners, LLC
5 BY: MATTHEW S. TROKENHEIM

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8 BY: KENNETH S. WEITZMAN
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11 Attorneys for Defendant Tablet, Inc.
12 BY: VIVIAN RIVIERA DROHAN

13 FENWICK & WEST, LLP
14 Attorney for Defendant Travix Travel USA
15 BY: TODD R. GREGORIAN

16 POLLOCK COHEN, LLP
17 Attorneys for Defendant Trip.com Group Ltd.
18 BY: ANNA MENKOVA
19 ADAM L. POLLOCK

20 SMITH, GAMBRELL & RUSSELL, LLP
21 Attorneys for Defendant Trivago N.V.
22 BY: ROBERT J. MALDONADO

23 CLAUSEN MILLER P.C.
24 Attorneys for Defendants VFM Leonardo, Inc., et al
25 BY: HARVEY HERMAN

LEWIS, ROCA, ROTHBERGER & CHRISTIE, LLP
Attorneys for Defendant Visa, Inc.
BY: MICHAEL J. McCue

1 THE COURT: All right, good morning, everyone. This
2 is The Wave Studio case.

3 So for fear of this taking the rest of our time up,
4 I'm going to do a very quick roll call, because I know it took a
5 long time just to gather all of you here today, but I want to
6 make sure I understand who's on the call.

7 So for Wave Studio, can you identify yourself, please.

8 MR. BERG: Sure. This is Gabriel Berg, with my
9 partner Roman Silberfeld and our colleague Zac Cohen, for The
10 Wave Studio.

11 THE COURT: Thank you.

12 For Visa, Inc., who's on?

13 MR. McCUE: Good morning, your Honor. Michael McCue
14 from Lewis Roca on behalf of Visa, Inc.

15 THE COURT: Good morning.

16 For VFM Leonardo, et al., there are a number of other
17 entities you represent, who is that?

18 MR. HERMAN: Harvey Herman of Clausen Miller.

19 THE COURT: Okay.

20 And who is on for Trivago?

21 MR. MALDONADO: Roger Maldonado from Smith Gambrell.

22 THE COURT: Okay.

23 For Trip.com?

24 MS. MENKOVA: Good morning, your Honor. This is Anna
25 Menkova from Pollock Cohen, with Adam Pollock.

1 THE COURT: Okay.

2 For Travix Travel USA?

3 MR. GREGORIAN: Good morning, your Honor. Todd

4 Gregorian of Fenwick & West.

5 THE COURT: Okay.

6 For Tablet, Inc.

7 MS. DROHAN: Good morning. This is Vivian Rivera

8 Drohan from Drohan Lee.

9 THE COURT: Okay, good morning.

10 For Signature Travel Network?

11 MR. WEITZMAN: Good morning, your Honor. This is

12 Kenneth Weitzman and Richard Straussman from Weitzman Law

13 Offices.

14 THE COURT: Okay.

15 For Setai Owners?

16 MR. TROKENHEIM: Good morning, your Honor. This is

17 Matt Trokenheim from Goldberg Segalla, and my clients, Bill

18 Olshan and Claire Leonard, are also on the line.

19 THE COURT: Okay.

20 For Emerging Travel?

21 MR. BAUER: Good morning. This is John Bauer and

22 Ashley Summer from Nelson Mullins.

23 THE COURT: Okay.

24 For Qatar Airways?

25 MS. PALLA: Good morning, your Honor. Sapna Palla

1 from Allen & Overy.

2 THE COURT: Okay.

3 Kayak Software?

4 MS. OAKLEY: Good morning, your Honor. This is Carla
5 Oakley. My colleague Meaghan Kent is also on the line. We
6 represent Booking Hotels, its affiliates, and also Southwest
7 Airlines.

8 THE COURT: Okay, thank you.

9 For General Hotel Management?

10 MS. RAMORE: Good morning, your Honor. Abigail Ramore
11 from Chiesa, Shahinian & Giantomasi, representing General Hotel
12 Management.

13 THE COURT: Okay.

14 Despegar.com?

15 MR. TRIGG: Good morning, your Honor. James Trigg
16 from Kilpatrick Townsend on behalf of the two Despegar entities,
17 and I'm joined by Briggs Wright.

18 THE COURT: Okay.

19 For Delta Air Lines?

20 MR. SHAPIRO: Good morning, your Honor. Sim Shapiro
21 from the law firm of Strikowsky, Drachman & Shapiro.

22 THE COURT: For American Airlines and British Airways?
23 Or is that doing business as? I'm sorry if I got that wrong.

24 MR. McELLIGOTT: Good morning, your Honor. This is
25 Drew McElligott, representing British Airways, from Crowell &

1 Moring. I believe Mr. Hogan was chiming in as well.

2 Howard?

3 MR. HOGAN: Yes, thank you.

4 THE COURT: Okay.

5 MR. HOGAN: Good morning, your Honor. This is Howard
6 Hogan, from Gibson, Dunn & Crutcher, on behalf of American
7 Airlines, separately represented.

8 THE COURT: I see, okay.

9 For Groupon?

10 MR. ROSENFELD: Good morning, your Honor. Jim
11 Rosenfeld from Davis, Wright, Tremaine.

12 THE COURT: For Amex?

13 MS. HOLLAND: Good morning, your Honor. Erica
14 Holland, and I'm joined by Anthony Pierce, from Akin Gump,
15 representing American Express.

16 THE COURT: Okay.

17 And for Cathay Pacific?

18 MR. WEINTRAUB: Good morning, your Honor. Andrew
19 Weintraub, from Nixon Peabody, representing Cathay Pacific.

20 THE COURT: Okay.

21 Did I miss anyone? Speak now.

22 MS. DODD: Your Honor, this is Kimberly Dodd, Foley &
23 Lagner, on behalf of the City. We're on the 22 5141 case.

24 THE COURT: Okay.

25 Anyone else who I did not call? All right, well,

1 welcome, everyone.

2 So let me just start with a quick disclosure, because
3 in preparing for this conference, I noticed that one of the
4 counsel for the Defendants, Howard Hogan, is someone that I was
5 a classmate with in law school and we had similar or overlapping
6 social circles. It's been probably over 20 years since I've had
7 any contact with Mr. Hogan, but I figured I would disclose it to
8 the group. I don't view this as a conflict of any kind, but
9 nevertheless, I wanted to disclose it at the outset before we
10 get into the weeds.

11 So with that, I understand that Judge Seibel has put
12 sort of a pause on any discovery or motion practice in your
13 cases so that you can have room to have some sort of settlement
14 conference or settlement discussions, so I read through your
15 joint letter with your respective proposals on how best to
16 accomplish that given the number of parties involved, and it
17 certainly seems like a threshold issue is, you know, what is the
18 most efficient way to organize a settlement conference; is there
19 some manageable way to proceed with some subset of parties based
20 on similar allegations or some other way in which you can group
21 yourselves.

22 So I see that Plaintiff at least has suggested one
23 way, which is to focus on a subset of Defendants they call
24 display-only infringement Defendants, and I understand from the
25 Defendants at least that they don't yet know who that would be,

1 so I guess the first question I wanted to ask the Plaintiffs is,
2 is it still your view that, one, is the most efficient way to
3 proceed with a settlement conference or group of settlement
4 conferences would be to focus on this subset of Defendants.

5 MR. BERG: Yes, your Honor -- this is Gabriel Berg for
6 the Plaintiff -- we do believe that that is the best way to
7 proceed just so that we're not -- it's not a free-for-all. We
8 have the display-only infringers and Defendants targeted,
9 they'll soon know who they are just as soon as we can make sure
10 we're not leaving anybody out, and we also intend to make a
11 demand of this subset group probably early next week, if we can.

12 And so from our position, it makes sense to focus on
13 display-only because the breadth of everything else is enormous.
14 It's distribution, marketing, advertising, and it's worldwide,
15 the infringement, as we see it, obviously, and so we think this
16 is the most efficient way to start. Hopefully, we can start
17 shrinking the number of Defendants and make progress in a
18 mediation with your Honor, so that's, that's our suggested
19 approach.

20 With all the other Defendants that we -- that are the
21 larger group of infringers, it's just much more complicated.

22 THE COURT: So from your perspective, there are
23 overlapping factual issues that are more narrow that would make
24 sense to start with them, sort of the low-hanging fruit, so to
25 speak?

1 MR. BERG: Yes, your Honor, and with that, we can make
2 demands of that group. We're not sure we're in a position yet,
3 but we're working hard with the client to make sure that this is
4 right, to make demands of the overbroad infringers. We're -- we
5 still can, we're just working hard to get through that, and
6 that's, that's a big process.

7 THE COURT: Okay.

8 So there are a lot of Defendants on the line. I don't
9 know if you've all collectively spoken with one another and have
10 a representative who wants to speak for the group or if I should
11 speak to each one of you individually, but do you have any --
12 assuming Plaintiffs identify this group to you so you know who
13 you are --

14 (Brief interruption)

15 THE COURT: All right, we've already started losing
16 people.

17 So if we start -- is there any reason if you're -- if
18 it becomes known to you who you are among these display-only
19 infringement group, does the Defendant group have any objections
20 to us starting settlement discussions and conferences with that
21 subset?

22 Is there someone from the group who wants to start? I
23 don't know who that would be.

24 MS. OAKLEY: Your Honor, this is Carla Oakley from
25 Morgan Lewis, representing Booking Holdings and its affiliates,

1 and also Southwest.

2 I think it's a threshold matter and I cannot speak for
3 all of the other Defendants, but as a threshold --

4 (Brief interruption)

5 THE COURT: Go ahead.

6 MS. OAKLEY: From our perspective, number one, it's
7 just impossible to evaluate the proposal without knowing who
8 these Defendants are, because we don't know -- you know, we just
9 don't know whether it includes one of our clients or how they
10 might be related to any of the other Defendants, so that is a
11 real threshold issue.

12 And then secondly, we've outlined in the letter to
13 your Honor the various types of information that we think are
14 critical not only to evaluating the claims, but to coming up
15 with a proposal to assist with this settlement process. We
16 think that there may be some other ways to organize the process,
17 you know, different grouping of Defendants, different grouping
18 of claims, but for reasons that still are not clear to us,
19 Plaintiff's counsel has declined to provide the handful of
20 things that we've identified in the letter that are, are
21 critical to understanding the full scope of the claims and which
22 Defendants are being accused of doing what.

23 So we think it's a little putting the cart before the
24 horse to come up with a proposal for the -- you know, how is
25 this going to play out until we have all of that information.

1 THE COURT: Okay.

2 So do any other defendants want to address that or
3 have anything different to add?

4 MR. BAUER: Yes, this is John Bauer for ETG.

5 As Ms. Oakley explained in the letter and at the
6 November 29th hearing as well, as did I, it was very clear that
7 at this stage of the litigation, the Defendants do not really
8 know what they're being accused of infringement and there were
9 specific requirements that the judge put on Wave in order
10 basically for the Defendants to be put on notice as to what
11 they're being accused of infringement, namely, pictures of the
12 photographs alleged to infringe, pictures of the photographs
13 that were alleged to be dispute -- to be distributed.

14 You will note that Wave has tried to basically
15 classify these Defendants into two groups: display-only is one,
16 and the other is display-only and distribution. You will note
17 that nowhere in Wave's submissions is there any photograph which
18 is alleged to have been distributed, and I think what Ms. Oakley
19 has articulated before the Court, and clearly ETG is on board
20 with that, that, in fact, Wave is putting the cart before the
21 horse.

22 This case has been pending for years and Wave is still
23 saying that they are not -- they are insufficiently prepared to
24 comply with what was expressly requested from them at that
25 earlier hearing.

1 THE COURT: Okay, understood.

2 Let me just make it clear to everyone that my question
3 about whether or not there's an efficient way to group parties
4 for settlement should not be viewed as not also believing that
5 the parties need to share a great deal of information just to be
6 in a position to start settlement discussions, so I definitely
7 will address that, but is there anything else that anyone wants
8 to add?

9 I think I understand the position. It seems to me
10 that a primary gating issue is making sure that the parties have
11 the necessary information and data to be able to proceed with
12 meaningful discussions, because you haven't really had the
13 sharing of information that -- it appears that you haven't
14 shared the information that Judge Seibel assumed you would share
15 to be able to have these conversations. I think that is, you
16 know, my primary concern, and I don't think I want to waste
17 anyone's time with settlement conferences before you all have
18 the necessary information to be able to evaluate your settlement
19 positions and get adequate settlement authority and to
20 understand the basis for that authority.

21 So I guess let me then -- so if that's true, and at
22 least the Defendants seem to be saying, that data and
23 information that is now missing will inform or help inform how
24 settlement conference -- how settlement discussions should
25 proceed, let's start with an understanding of what the parties

1 need by way of information and exchanging of data to be in a
2 position to have a settlement discussion.

3 So let me start with the Plaintiff. From what I could
4 tell in your letter, you said that you needed information from
5 the Defendants relating to their insurance coverage, including
6 the names of their insurers, policy limits, and their
7 reservation of rights. Is that correct?

8 MR. BERG: That is correct, and -- this is Gabriel
9 Berg. May I address the broader question and when you're ready,
10 I have a -- I just want to let the Court know what we've done to
11 date and what we've invited the Defendants to do to date.

12 THE COURT: Okay, before we get there, can you tell
13 me, is there any other information from your perspective that
14 you would need from the Defendants to be able to be in a
15 position to draft settlement demands to them that would
16 separately for each Defendant explain your rationale for your
17 demand and whatever other information relates to, you know, what
18 claim, what photographs, et cetera.

19 MR. BERG: Yes. There is information that we would
20 like to get from Defendants, but I -- it really does start with
21 the following.

22 We filed a master complaint, and in the master
23 complaint, we identified by photograph number per hotel, and
24 when I say per hotel, these infringements relate to about
25 thirty, 35 high-end hotels and we identified by photograph, by

1 Defendant, by picture number, and then delivered all the
2 pictures to them in PDF form. And the biggest gripe I've heard
3 so far is that the PDF form doesn't allow them to search, but
4 what we would need from the Defendants is the following. We
5 invited this -- and this is in our master complaint. We invited
6 all Defendants to do the following.

7 To allow us to deliver to them in electronic form all
8 the photographs that we are say -- that we say are being
9 infringed per hotel, and what, then, the Defendants could do is
10 go back to their clients and search their library of
11 photographs, and let me stop and say why we think that's
12 necessary.

13 The infringement as we've identified it is not the
14 complete universe. We do not have the Defendants' libraries of
15 photographs to identify as much of the infringement as we can,
16 and the reason we don't have that are -- is twofold. One, these
17 photographs get taken down and reposted on -- what we can tell,
18 about every thirty days or so, so the easiest way to accomplish
19 the Defendants knowing exactly how they're infringing is for us
20 to deliver the photographs to them and let them search their own
21 libraries.

22 Now, we have had -- we've invited that for each and
23 every Defendant and all but, I think, one, which is Trivago, has
24 said, "no, we're not going to do it that way, you have to tell
25 us how we're infringing." We've done that to the extent that we

1 can in our master complaint, by photograph, by Defendant, by
2 hotel, but it isn't the universe, and the amount of information
3 that we did gather in a short amount of time -- and I should
4 mention that my firm, Robbins Kaplan, is pretty new to the case,
5 so we haven't been here -- we've only been in the case since
6 last April or so, so if the Defendants were to do what we
7 invited, they would know the universe of infringement before we
8 would know the universe of infringement, and we're going to get
9 this in discovery anyway.

10 So they could also take the photographs that we did
11 provide as part of the master complaint and begin this process.
12 We have told them, there it is, a hotel in Miami, I'll use Setai
13 as an example, okay, Setai, your hotel is infringing the
14 following 15, 20, whatever the number is, photographs, please go
15 take our library and see if there aren't more, because you're
16 the only one in possession of those photographs.

17 Now, with all that said, your library photographs,
18 with all of -- let me also add, it's not hard per hotel, it
19 shrinks the universe to about 30 or 35 hotels, and that makes
20 it, from where we sit, manageable, but the overarching point
21 that I'm hearing, your Honor, is, it makes perfect sense to
22 start with the display-only photographs for all the reasons we
23 are discussing now. They should -- the display-only is
24 identified. It is not as complicated as identifying the rest of
25 the universe, and we are prepared to make a demand on those

1 parties because it's not as complicated.

2 So I -- what I'm hearing from Defendants so far is a
3 reason to go about it with this first group, display-only,
4 first.

5 THE COURT: Okay. When you're referring to delivering
6 to Defendants electronically the photos by hotel, by Defendant,
7 those are tied to your master complaint already, those are
8 photos that you've identified in your master complaint?

9 MR. BERG: I would -- I believe that's right. I think
10 it's gotta be the vast majority of them. I don't know that it's
11 a hundred percent, but it, it certainly -- we know that universe
12 of photographs because, from our position, and I don't know that
13 Defendants agree or disagree with this, the number of
14 photographs at issue in the Singapore case is identifiable and
15 there -- that number we have. And we're prepared to give --
16 it's actually about 3,000 photographs. We're prepared to give
17 the Defendants our library so that they can go back and compare
18 it against their own library to identify the infringement.
19 Again, it's what we would get in discovery anyway, and it would
20 happen very quickly as it did with, to their (indiscernible)
21 credit, Trivago.

22 THE COURT: So if I understand you correctly, you know
23 some -- you have some photographs that you already identified as
24 infringing or being the basis for infringement by Defendant and
25 that's in your master complaint, and what you're proposing is to

1 deliver to Defendants sort of the whole universe of photos
2 beyond what's in your master complaint, identified by Defendant,
3 and have them search their libraries to see if they also may
4 have infringed those? Or -- is that what you're suggesting?

5 MR. BERG: That is what I'm suggesting, and it
6 actually goes back to something Judge Seibel said at our, our
7 conference in November.

8 She basically said ownership is decided over all these
9 call it 3,000 photographs and Wave owns these photographs. She
10 said it seems real easy as a matter of proving the case because
11 either the Defendant has the picture and has it on their website
12 or had it on their website at one point or not, and that seems
13 -- seemed to her to be a pretty easy thing to, to find out, and
14 we agreed and that's why we made the proposal we made.

15 THE COURT: Okay, and so it -- the Defendants, though,
16 I'm assuming, are in opposition to this because it sounds like
17 they think you're having them do the homework of figuring out
18 your claims for you, like, which photos you think they've
19 infringed, beyond what you've already identified in the master
20 complaint.

21 Is that fair to say?

22 MR. BERG: Well -- I'm sorry.

23 THE COURT: I mean, I can ask the Defendants to speak
24 to this, but it seems like you have a universe you identified in
25 your master complaint, and it sounds like you don't want to

1 proceed with settlement discussions about that limited universe
2 because you think there are more out there that are infringing,
3 and that's something you would, of course, learn in discovery,
4 but haven't learned yet, so you'd like as part of the
5 settlement-discussion process for Defendants to go out, do some
6 limited discovery essentially of identifying in their search
7 library which photos they may also have infringed and then
8 identify that for you, so that you can then include that as part
9 of your settlement discussions.

10 Is that right?

11 MR. BERG: That's, in part, true, because at our last
12 conference, each just -- not each, but most Defendants stood up
13 and said "we don't know how we're being accused of infringement,
14 we'd really like to know the answer to that," and the answer to
15 that is, we'll give you our photographs, you'll discover as much
16 of the universe as you can using your own library of photographs
17 to get to the answer that you say you want and one we would get
18 in discovery anyway.

19 We're not asking anyone to go off and do our work for
20 us. It's based on the statements in open court that the
21 Defendants really wanted to know the answers to these questions.
22 That's one. And, two, we have identified thousands and
23 thousands of photographs that are infringing as part of our
24 master complaint to put them on notice of what our claims are.
25 You can't receive the library of photographs that we provided

1 without at least being on notice of -- as much as we know, of
2 the infringement. It's quite a bit as much as we know, but it
3 isn't the universe, and to get the universe, this is the easiest
4 way to do it. So that's, that's all we're saying.

5 We're not saying we're not prepared to negotiate with
6 other folks. That's not what we're saying. We, we just think
7 it's going to be harder, as opposed to the display-only who get
8 a list of the photographs we have and a demand, and that, that
9 seems, to us, to be the beginning point.

10 THE COURT: Okay. I guess when I read Judge Seibel's
11 -- I mean, the transcript, I don't know if you've had -- the
12 transcript that I reviewed was dated November 29th. Did you
13 have a conference with her after that date?

14 MR. BERG: We did not.

15 THE COURT: Okay. So I read that transcript and I
16 guess what -- my takeaway from that was that she felt, heh, that
17 it was still the Plaintiff's responsibility to identify their
18 claims, what photographs they believe were being infringed upon
19 by which Defendant and when, and she contemplated that you would
20 be providing that information as part of your master complaint
21 in some handy-dandy spreadsheet form that could be searched by
22 Defendants, ideally in a native form, so that if they wanted to,
23 they could sort it and figure out how to slice and dice the data
24 that you've collected and it would be on that basis that
25 settlement discussions would move forward.

1 And I think you pointed out, I think it was you, or
2 someone from the Plaintiff's, that, well, there's more out
3 there, and if I'm not mistaken, Judge Seibel's view was, yes,
4 that's something you would get in discovery and if you needed
5 to, you could amend your complaint or amend and add them later,
6 but I didn't read her to say that you could -- that it was
7 Defendants' obligation, at least at this stage, to try to
8 identify your claims for you or identify the infringement for
9 you.

10 So I understand that your view is that that's going to
11 help you in formulating your settlement demand, but I guess
12 that's sort of the nature of having a settlement discussion at
13 an early stage of discovery. You're -- that happens in every
14 case. You have settlement discussions at a certain point with
15 some limited data and information, and based on that, you
16 formulate a settlement demand or evaluate your settlement
17 position and what you might want.

18 And I take it that your concern is that number's going
19 to be artificially low because you think there's a larger
20 infringement out there, but I guess we have to balance here the
21 need for efficiency at this early stage of the case where you
22 haven't had discovery into that and also your obligation to just
23 sort of go with the information you have and proceed from there.

24 So I guess your point, though, is the way to do that
25 would be to -- you could avoid the search library step if you'd

1 focused on display-only Defendants. Is that right?

2 MR. BERG: That's right, but I also have to say we
3 have actually done what Judge Seibel asked us to do and put
4 Defendants on notice, per Defendant, per photograph. The only
5 thing that we couldn't do is give them a handy-dandy
6 spreadsheet, because that doesn't exist. There are literally
7 1,500 separate spreadsheets which, when printed out, would look
8 like exactly what we delivered to the Defendants, so we did what
9 we had to do to give notice per Defendant, per photograph, which
10 is what we were driving at with Judge Seibel. We don't have the
11 ability to have that handy-dandy spreadsheet.

12 But, again, what you said is exactly right, your
13 Honor. This is all a reason to proceed first with the
14 display-only group, because it's just much more efficient and
15 easier.

16 THE COURT: Okay. So from what I heard from you, to
17 be able to make a demand, in the first instance, you want
18 insurance coverage information from each Defendant, and in order
19 to be able to do demands on each Defendant beyond just the
20 display-only Defendants, you would want to deliver to Defendants
21 electronically photos -- your photo library, have them each
22 search their photo library, and then identify for you which
23 additional photos they may be infringing.

24 Do I have that right?

25 MR. BERG: Absolutely, yes.

1 THE COURT: Okay. And that's it, okay. So is there
2 anything else that you think you need to be in a position to
3 provide settlement demands to Defendants?

4 MR. BERG: I don't believe so, but I would ask Mr.
5 Silberfeld to weigh in if he disagrees with me.

6 MR. SILBERFELD: Nothing additional, your Honor.

7 THE COURT: Okay.

8 So let me turn to Defendants, and I don't know if it's
9 Ms. Oakley who will be speaking or if others want to chime in.

10 Based on your statements in the letter and what that
11 I'm hearing today, for you to be able to move forward, you have
12 a number of requests. You want a native version of the PDF
13 spreadsheets that were attached to the master complaint, for
14 one. Is that right?

15 MS. OAKLEY: Yes, this is Carla Oakley, and, yes,
16 that's the top priority.

17 THE COURT: Okay. And at this point, you only have a
18 PDF version; is that the issue?

19 MS. OAKLEY: That is correct. We only have what was
20 attached to the master complaint, which is a PDF version, which
21 cannot be sorted in any way, shape, or form.

22 THE COURT: Okay.

23 So, Mr. Berg, Mr. Silberfeld, why can't you provide a
24 native version? What is the holdup? Explain why this is a
25 negating issue for you.

1 MR. BERG: Sure. Sure, this is Gabriel Berg.

2 The real answer is, you know, there's nothing really
3 to sort. The spreadsheet, and there are, again, about 1,500 of
4 them, when printed out, look exactly like what the Defendants
5 already have in their possession. There's not -- if you tried
6 to sort the spreadsheet itself, it wouldn't do anything. They
7 have the photograph number, but it's not linked to a picture,
8 it's not linked to evidence of a website that is exactly in --
9 as we, we captured it per Defendant. Those things aren't linked
10 together.

11 What we have provided are a printout of the
12 spreadsheet which identifies exactly what the spreadsheet itself
13 identifies, and that is photograph numbers and we've provided
14 photograph numbers per hotel to each Defendant so that they can
15 know. Certainly they know now the photographs that we are
16 saying they are infringing photographs. They know that. As we
17 know it. So I'm not sure the spreadsheets will help them.

18 If they want 1,500 spreadsheets that aren't linked to
19 anything and are sortable for whatever reason, I guess we can
20 give that to them, but I'm not sure it's going to help.

21 THE COURT: Okay, so what I'm hearing from you is,
22 there's no reason you can't provide it to them other than you
23 don't think it will be helpful to them. Is that right?

24 MR. BERG: Let me ask Mr. --

25 THE COURT: It's feasible to do it, it's feasible; you

1 | just don't think it -- you question whether it would be helpful.

2 | Am I right about that?

3 | MR. BERG: I think that's right. I think that's
4 | right. I will just ask Mr. Cohen to confirm.

5 | That's right, isn't it?

6 | (Brief pause)

7 | MR. BERG: Well, I believe that's right, your Honor.

8 | THE COURT: Okay. So in my view, I don't see why you
9 | shouldn't provide it. They want it, it seems to be what they
10 | need to be able to move forward, and it's of top priority. It
11 | seems silly to withhold it if it becomes an impediment to having
12 | settlement discussions, so I think you should provide the native
13 | versions of these spreadsheets to the Defendants.

14 | So at the end of this, I'll set -- my goal is to set
15 | deadlines for the exchange of all the data that's necessary to
16 | formulate settlement demands. I will set deadlines for that.
17 | I'm going to set deadlines for Plaintiff to make demands for --
18 | on the Defendants and for Defendants to respond, but I'll take
19 | each of these issues one by one initially, I just want to tell
20 | you what my end game is here, but -- so for the native version,
21 | I think that needs to be provided. I don't hear a reason why it
22 | shouldn't be.

23 | Okay, the second issue that I see is the asserted
24 | photographs in a format that can be searched or organized, so
25 | perhaps the Defendants, maybe Ms. Oakley, can explain to me what

1 exactly you need and why you need it.

2 MS. OAKLEY: Yes, thank you, your Honor. This is
3 Carla Oakley again.

4 And so the way the photos were provided so far are
5 multiple --

6 (Brief interruption)

7 MS. OAKLEY: Multiple photos on individual sheets that
8 are JPEGs or -- excuse me, PDFs that we cannot search. What we
9 need to be able to do is to easily locate the photos, match them
10 up with what's been identified per registration certificate, and
11 then, ideally, we are also asking for the alleged infringements
12 themselves so that we can match up what's the original and
13 what's the --

14 (Brief interruption)

15 THE COURT: All right, Ms. Oakley, go ahead.

16 MS. OAKLEY: We have been informed by Mr. Berg that --

17 (Brief interruption)

18 MS. OAKLEY: Goodness, there are a lot of people are
19 going in and out here.

20 We've been informed by Mr. Berg that Plaintiff does,
21 indeed, have a library or some kind of share file of JPEGs of
22 these photos that could be provided, they just haven't been
23 provided for reasons not clear to us, but they -- it would help
24 us, again, tremendously just to be able to line up the data and
25 ascertain, you know, what's being alleged.

1 THE COURT: So the asserted photographs at this point
2 --

3 (Brief interruption)

4 THE COURT: -- that you need are in PDF form and not
5 in jpg form? Is that the format issue?

6 MS. OAKLEY: Correct, and, in fact, it's multiple
7 thumbnails on each page and then several pages per PDF, and
8 there are thirty different PDFs, so if you want to find a
9 particular photo, you can't do any kind of search --

10 (Brief interruption)

11 THE COURT: You were saying you can't do any kind of
12 search that --

13 MS. OAKLEY: So -- correct.

14 THE COURT: Okay.

15 MS. OAKLEY: If we look at the spreadsheet and it
16 identifies photo no. 4 from registration certificate X, Y, Z, we
17 would not be able to find that actual photograph and look at it
18 in the J -- in the PDFs that were found. That's why we need the
19 JPEGs of the photos.

20 THE COURT: Okay. And that would help you for
21 purposes of linking which photograph applies to each defendant
22 and each infringement. I thought that --

23 (Brief interruption)

24 THE COURT: What I understood was the master
25 spreadsheet or -- in the master complaint already provides you

1 with the photographs per Defendant. Is that not accurate?

2 MS. OAKLEY: It identifies it only by number and by
3 registration certificate, but we don't see the actual
4 photograph, so to link up what is the photograph itself to the,
5 you know, to the number that's identified in the spreadsheet
6 into something searchable so that we can locate it, and then as
7 the second step, once we are provided the actual alleged
8 infringements, and those also have not been provided, we will
9 then be able to compare what's the original and what's the
10 alleged infringement.

11 THE COURT: And when you say "the alleged
12 infringement," you're talking about something other than the
13 photograph at issue?

14 MS. OAKLEY: Correct. So we have the photograph at
15 issue, which is the photograph that Wave claims ownership in,
16 and then we have the alleged usage by each of the different
17 Defendants and so that would be the alleged infringement, and --

18 THE COURT: And in what format would you expect them
19 to provide that to you?

20 MS. OAKLEY: So we have requested that the alleged
21 infringement be actually linked to the spreadsheet.

22 We under -- Mr. Berg has said here today that they
23 don't have it in that fashion, but at the very least, we should
24 get, you know -- if we don't have it linked in that manner, we
25 should get a printout of each one of the alleged infringements.

1 THE COURT: You were moving to the third issue, so I
2 understood the second issue we were talking about were the
3 asserted photographs in a format that can be searched or
4 organized, so that's this library that you're talking about that
5 you want in JPEG form that you can search and --

6 MS. OAKLEY: Correct.

7 THE COURT: -- THEN separately you want active links
8 to or screen shots of the alleged infringements themselves in
9 some form.

10 MS. OAKLEY: Correct. Correct.

11 THE COURT: And --

12 MS. OAKLEY: And, again, we're told they exist, and
13 for some reason, they don't want to give them to us.

14 THE COURT: Okay. So, Mr. Berg, is that -- can you
15 explain what this issue is and where you stand?

16 MR. BERG: Sure. Thank you, your Honor. This is
17 Gabriel Berg again.

18 What we've given allows them to see the photograph
19 that we say is infringing. Let me start with that. Our library
20 electronically that we delivered to Trivago, we can deliver
21 presumably to all Defendants. I don't think that's a problem at
22 all.

23 The, the missing facts are, A, to satisfy all 90-plus
24 Defendants, that we have screen shots of their infringement, is
25 something that we have that will take a really long time to

1 compile. It's fine, if that's the way the Court wants to go,
2 it's just going to take forever, because there are hundreds of
3 thousands, if not more, of these infringing photographs, but
4 what's more efficient is what we started with, and I'm going to
5 give another fact as to why, if we deliver our library and they
6 compare it against their own library, then we get closer to the
7 universe and it takes -- probably took Trivago about two weeks?
8 Three weeks? Something like that. The most. And they got
9 their heads around what we said is the infringement.

10 But more importantly than anything, if we deliver to
11 the Defendants in electronic form the photographs that we own,
12 they can go and look currently, and this is something we've
13 spot-checked from time to time, currently, these photographs are
14 being used to promote the thirty-plus hotels, upscale hotels, on
15 almost every Defendant's website. That's what the goal was
16 with, with some of the Defendants, they wanted to take the
17 photos down so that we can't come back later and say we sued on
18 day one, and on day 400, the photograph was still up.

19 So what we are suggesting, the method we are
20 suggesting, is one of efficiency and also should be something
21 the Defendants want so that they can take these photographs down
22 sooner rather than later. To the extent that Ms. Oakley wants
23 screen captures of all the infringements of each Defendant, that
24 is going to take a really long time for us to compile per
25 Defendant. I would say it would take months and months.

1 So, again, most of her clients are in the category of
2 not display-only, there are a host of Defendants, I think the
3 number's about 37, 38, who are display-only, and if we're going
4 to be ordered to produce now all the infringements that we know
5 in screen captures, then this is even more reason to do this in
6 phases because it is to the detriment of the most efficient
7 process, which is the one that I've described.

8 THE COURT: Okay, so taking it one step at a time, the
9 first issue is with the asserted photographs in a format that
10 can be searched or organized, and what I understood from the
11 Defendants was that an electronic library of those photographs
12 would be sufficient for their purposes.

13 Am I right about that, Ms. Oakley?

14 MS. OAKLEY: Yes, your Honor.

15 THE COURT: Okay.

16 And what I heard from you, Mr. Berg, is that you have
17 that electronic library and that you are happy to provide that
18 to all of the Defendants and it's easy for you to provide, or
19 relatively easy. Is that right?

20 MR. BERG: I think that's correct. I, I need to make
21 -- if you can give me some time so that I'm not saying something
22 wrong, I think that's correct, but I would need a day or two to
23 confirm that just with some folks who I need to speak to who are
24 sort of in charge of this library.

25 I believe it is correct that we can do that because I

1 believe we did it with Trivago, but I don't know that I should
2 -- that I can say we have it for each and every one of the
3 photographs that we know is infringing, but maybe it's true, I
4 just need a day to figure that out.

5 THE COURT: Okay.

6 Okay, and so then the third issue that I was trying to
7 address is this alleged infringements. Defendants are asking
8 for these active links or screen shots. What have you provided
9 up till now that describes or puts the Defendants on notice of
10 the alleged infringement?

11 MR. BERG: Yeah, what we've provided now is we've
12 broken down the photographs per hotel. We've given them
13 numbers. We have said to each and every Defendant, you are
14 promoting hotel X, and what -- from what we know, since we own
15 all 3,100 photographs, we have identified the following
16 photographs on your website at various points in time and we
17 have delivered, delivered a -- I think it's a huge file of
18 pictures with the number that we say is infringing that
19 corresponds to the hotel and to the Defendant and to the
20 website. We've written that in our master complaint.

21 What we --

22 THE COURT: And that was also based on -- oh, go
23 ahead, I'm sorry, Mr. --

24 MR. BERG: That's okay.

25 THE COURT: So you gave them a website. Did you tell

1 | them the date or when it was infringing? Was that part of it?

2 | MR. BERG: It -- we, we have it at various points in
3 | time along the continuum, literally over the last ten years, and
4 | we did make that clear in our complaint.

5 | THE COURT: Okay.

6 | MR. BERG: What I think, what I think Ms. Oakley is,
7 | is really searching for is the thing that's going to take months
8 | and months and months, and it's something I agree they would
9 | certainly get in discovery, which are the screen shots when,
10 | again, most of these photographs are being displayed today.

11 | THE COURT: Okay.

12 | So, Ms. Oakley, why do you need the screen shots
13 | themselves or the active links if you have at the moment a
14 | description of the photos that were allegedly infringing and the
15 | websites that had the photo and dates or periods of time which
16 | that photo appeared? Why is that at least not sufficient for
17 | initial settlement discussions?

18 | MS. OAKLEY: So as a first off, we disagree and, and
19 | dispute that the photos are currently in use, so we have a
20 | fundamental disagreement on that point.

21 | Secondly, to the -- when you look at the spreadsheet,
22 | there are -- you know, sometimes, it's a, a domain name,
23 | sometimes it's a longer kind of a URL, but if you go to those,
24 | those websites, you don't find those photos. They're historic,
25 | so they aren't something that we can immediately go use that

1 information to even find them.

2 To the extent it's something other than just a website
3 domain, it's a longer kind of URL or a string, to the extent
4 that we have, you know, spot-checked those, they're not even
5 active, we can't find them, so the identification that was
6 provided --

7 (Brief interruption)

8 MS. OAKLEY: -- does not actually allow us to look at
9 the alleged infringement, so that's why we're saying, okay,
10 Plaintiff, you, you must know -- you must have in your
11 possession whatever it is that you identified in this
12 spreadsheet, just give it to us so that we can see.

13 Because, again, this is, this is historic, this is
14 old, they should have it, and we're just asking for them to
15 provide to us what they have, because we really cannot identify
16 what they contend is an alleged infringement, and there -- as
17 far as we know, there are no current infringements going on,
18 notwithstanding the contentions to the contrary.

19 THE COURT: So is it your position that all of the
20 links or whatever URLs they provided in this spreadsheet aren't
21 working? Are some working, but --

22 MS. OAKLEY: Right.

23 THE COURT: -- not others, or are none of them
24 working --

25 MS. OAKLEY: Right.

1 THE COURT: -- or able to be opened?

2 MS. OAKLEY: So there are no links and the URLs, I'll
3 call them that, that are there just are -- you know, don't exist
4 anymore, they're old, and so that's why we're not able to
5 identify what is alleged to be an infringement.

6 THE COURT: Okay.

7 So, Mr. Berg, when you put together the master
8 spreadsheet, those URLs were tied to something, I imagine, so
9 what's the underlying data that they're pointing to and where
10 does that exist?

11 MR. BERG: There are screen captures over the years
12 that do identify at a specific moment in time the infringement.
13 However, this is what Ms. Oakley and I were discussing the other
14 day, we -- they're going to get that in discovery, every single
15 page that we have of infringement, and it's absolutely enormous
16 and we -- they're going to get it. I do think that will take
17 months.

18 What I do think is more efficient is for us to provide
19 our library to the Defendants electronically and they will see,
20 I showed Ms. Oakley this the other day, that most of these
21 photographs are still being used with these hotel -- in the
22 promotion of these hotels.

23 Historical URLs that connect to nothing does not mean
24 that that same photograph is not up today. This was a moment in
25 time and we spot-check it from time to time, or have done that

1 over the past ten years, which is why there is so much
2 information, but that snapshot in time doesn't tell the full
3 story. It doesn't tell the story of how long it was up, whether
4 it's still up, when it came down, why it came down. We are the
5 ones who are hunting and pecking, and that's why we have what we
6 have. Certainly enough to satisfy the master complaint and put
7 everybody on notice. We've done that.

8 What we -- is more complicated is to give them every
9 single page of a, of a screen shot, a moment in time when,
10 again, the easiest and most efficient way for them to know the
11 universe of infringement is to take our library, compare it
12 against theirs over the years, historically, and they will know,
13 and we will get it in discovery, exactly each allegation of
14 infringement.

15 We know some, we know snapshots, we've let them know
16 that, and it is far, far, far from the whole story, and that's
17 why we're suggesting this, this approach, so that's, that's --

18 THE COURT: So, Mr. Berg, where do these snapshots
19 that you currently have exist? How do they exist, and in what
20 format?

21 MR. BERG: They -- the ones that I have seen exist in
22 PDF form, but it's, it's real easy to identify a picture, and
23 that's, that's sort of the easy part.

24 We have a Wave photograph, we have a Defendant, we
25 have their website up and we have a screen capture, and we link

1 | it to a copyright registration number. That, we have. But we
2 | have it in droves and droves and droves. That's the problem, is
3 | it will take months to produce all of that to each of the
4 | Defendants, and it -- again, it tells a tenth of the story
5 | because it's a snapshot in time. And we did update it from time
6 | to time, but it, it does not tell the complete story and far
7 | from it, and --

8 | THE COURT: I'm still trying to understand how it
9 | exists. Is it in a database that's searchable? How -- in what
10 | format do you have these screen shots or these screen captures?
11 | And are they --

12 | MR. BERG: Well, I --

13 | THE COURT: -- searchable, identifiable by Defendant?
14 | I'm not saying -- I'm just wondering, I don't
15 | understand yet in what format or how they exist in your records
16 | at this stage.

17 | MR. BERG: The ones, the ones I've seen exist in PDF
18 | form, those are the ones I've seen, that show the Defendant's
19 | website that, show a date, that show a picture matched to
20 | another picture. That's -- those are the ones that I have seen
21 | to show historically the infringement.

22 | THE COURT: Okay, and for each -- and so each PDF,
23 | does it -- is it, is it clear which Defendant it's talking about
24 | and --

25 | (Brief interruption)

1 THE COURT: -- which (indiscernible) about the date.

2 MR. BERG: Yes, it does have that information as I've
3 seen it, for sure.

4 THE COURT: Okay, so --

5 MR. BERG: And that is the information that will take
6 months and months and months to compile per Defendant or to at
7 least disclose to them in way that I think they'll be able to
8 understand what we are saying, which I -- again, is not even
9 half the story, given what they know and given the photographs
10 that they have.

11 THE COURT: So I guess I'm trying to understand why
12 these PDFs will take months and months to compile. If they
13 exist in some form in a -- you know, on a database somewhere,
14 why, what's the reasoning behind them taking months to compile?

15 You're saying to slice and dies them by Defendant is
16 what would take long? To have someone sort them and collate
17 them? Because they haven't been -- because there's not
18 sufficient metadata to sort them or something, or there's no
19 vendor who can do that for you? What exactly would take so
20 long.

21 MR. BERG: I think it's all of the above, but I, I
22 need -- honestly, I need to speak to my technical folks to give
23 you a more precise answer. I'm saying months and months and
24 months based on just what I've seen.

25 Maybe there are other ways to do it more efficiently;

1 I don't think so, but -- given the way I've seen it stored, but,
2 you know, I, I'm happy -- again, give me a couple days, I will
3 talk to our IT specialists and see if there is some easier way
4 to do that.

5 THE COURT: Okay, so --

6 MR. BERG: And, again --

7 THE COURT: -- here's what I'm thinking. I mean,
8 I...it sounds like at least with the asserted photographs in a
9 format that can be searched or organized, you have that in an
10 electronic library that you can provide or at least think you
11 can provide, so -- but you need a couple days to confirm that.

12 This active links or screen shot issue, it sounds to
13 me like we need more information to understand the format that
14 it's in and what's actually involved in providing it in some
15 form or fashion and what work goes into putting it together.

16 I'm not ruling here that you have to provide it. What
17 I would like to know and have a better understanding is, like,
18 what backs up your view that it's going to take months and
19 months to provide, because, like, it just doesn't make sense to
20 me that it would, to produce a bunch of data. What might take
21 time, I imagine, is if it's not in some searchable form that can
22 be organized easily, but in this day and age, with electronic
23 databases and vendors and a case of this scale and magnitude,
24 it's hard for me to imagine that there isn't some efficient way
25 to try to organize that data.

1 That's going to have to be done in discovery in any
2 case, but obviously I don't want to hold up -- if we hear from a
3 vendor that it's going to take months and months for some
4 reason, I don't want that to necessarily hold up your ability to
5 engage in settlement discussions, but I think we need more
6 information.

7 MR. BERG: And that's all I'm trying to say is I want
8 to get you that information and --

9 THE COURT: Okay, but I'm going to -- I think you --
10 I'd like you to get that information and I will circle back to a
11 deadlines about that, but I think it's important for us to
12 understand that before -- but my leaning right now is to have
13 some form of that information provided, absent some, you know --
14 if we can figure out an efficient way to do it.

15 Maybe it's some subset we can talk about, but it seems
16 to me they need to understand -- if they can't understand the
17 alleged infringement based on the spreadsheet you've provided so
18 far with these URLs that aren't working, I think they need to be
19 able to understand what it is you're talking about, and you have
20 that information, it just sounds like it's a lot of work to
21 compile and put in a format that can be produced.

22 So let's try to understand what that looks like to see
23 if there's some way to cut through it and maybe provide
24 something, perhaps short of, you know, whatever would take
25 months and months to compile.

1 MR. BERG: Yes, I'm in the process of figuring that
2 out and I will figure that out and let the Court know.

3 THE COURT: Okay.

4 MR. BERG: But I do think we've given them enough
5 information that they can take the photographs they have and go
6 back to their own (indiscernible) --

7 THE COURT: Okay.

8 MR. BERG: -- and tell us more.

9 THE COURT: Okay. And so the other issues the
10 Defendants raise, but I wanted to understand the search.

11 So we've covered at least three of the issues that the
12 Defendants believed Judge Seibel ordered, or at least were
13 discussed with Judge Seibel, and those are ones that the
14 Defendants believe they need in order to proceed with settlement
15 discussions.

16 Am I right about that, Ms. Oakley?

17 MS. OAKLEY: Yes, your Honor, and if I may, just two
18 quick things.

19 One is just to correct this notion that the Defendants
20 all have some kind of a library. I just don't -- you know, Mr.
21 Berg has referenced that multiple times. We haven't refuted it
22 or discussed it, but I just don't want to let that go, any
23 misunderstanding about it. I think he's misconceiving what
24 exactly exists on the defense side.

25 I do want to -- I know I've sort of monopolized the

1 discussion here on behalf of Defendants, but Abby Ramore has had
2 the longest history. She has the understanding of the past
3 discovery. I think it would be useful to hear from her if she
4 has anything to add at this point.

5 THE COURT: Sure, and I don't mean to exclude any
6 Defendants who want to speak up if there's more that needs to be
7 said. I was just deferring to Ms. Oakley because it seemed like
8 they were nominating you to do that.

9 MS. OAKLEY: Fair enough.

10 THE COURT: Okay.

11 So go ahead, anyone else? I guess that's Ms. --

12 MS. RAMORE: Yes, thank you.

13 THE COURT: Yeah, go ahead.

14 MS. RAMORE: All right, thank you, Carla. This is
15 Abigail Ramore, representing General Hotel Management, and as in
16 the letter and I think as Carla referenced, I am the person
17 that's been around as far as attorneys and been involved the
18 longest of everyone.

19 I do want to address and, perhaps, if it's okay with
20 your Honor, ask Mr. Berg some questions, because I have seen
21 some screen shots in the context of discovery as to the
22 threshold issue.

23 They're, of course, incredibly old. They were
24 provided to my predecessor counsel in 2013 in a basically one
25 set of document production that was in individual PDFs, none of

1 which were searchable. A lot of them were screen shots. Some
2 of them were e-mails. It was a mess. It exists somewhere on a
3 hard drive. I assume Plaintiff has a copy of the same hard
4 drive.

5 But it -- the vast majority did not have a date as to
6 when the screen shots were taken and things like that and did
7 not have, you know, sufficient information for us to kind of be
8 able to say, okay, I can run a search and send Ms. Oakley's
9 clients all of the ones that I have, because they just simply
10 weren't searchable, they were individualized PDFs and really not
11 -- so it -- I would be interested if Mr. Berg has additional
12 screen shots, or perhaps native files, that would be more
13 helpful to what the rest of the Defendants are looking for from
14 the perspective of the infringements.

15 THE COURT: Right. It sounds like -- and I'll let Mr.
16 Berg speak, but it sounds like what he was saying is he needs to
17 find out more information about that.

18 But, Mr. Berg, I don't mean to speak for you. Do you
19 have more to add?

20 MR. BERG: No, I just -- exactly what you said. I
21 need some time to figure out exactly what it -- how we can get
22 it produced and if it is just PDF screen shots. I've seen some
23 PDF screen shots as well, and I've also, I believe, seen some
24 electronic screen shots, I'm not a hundred percent sure though.
25 I just need more time. Is the answer.

1 THE COURT: Okay. And Ms. Ramore --

2 MS. RAMORE: And then I also --

3 THE COURT: -- did you have anything else to add?

4 MS. RAMORE: Yes. Thank you, your Honor.

5 I also want to address, and perhaps request some
6 clarification, with respect to Mr. Berg's proposal regarding
7 providing the library of the Plaintiff's photographs and having
8 the Defendants compare them with their, you know, to the extent
9 that they have libraries or whatever that looks like.

10 So I want to be clear that at least -- and I think I
11 can speak for the Defendants, but -- the rest of the Defendants,
12 but I will allow them to contradict me, but what was proposed
13 before Judge Seibel and what was proposed before in Mr. Berg's
14 letter of December 13th to the Defendants was not exactly as
15 what's being described here. What we were asked to agree to
16 was, we will send you a list of all of the hotels and we want
17 you, Defendants, to send us every picture of that hotel that you
18 have, and I think that is...well outside the scope of what the
19 Plaintiffs would get in discovery because there might be -- you
20 know, these pictures, I think the most recent one, was taken in
21 2008. I might have a picture of the Setai that was taken
22 yesterday. I don't think the Plaintiffs are entitled to that
23 unless Wave took it.

24 And so I just would like some clarity from the
25 perspective of what exactly the Plaintiffs are looking for and

1 -- because, to me, what Mr. Berg just explained is entirely
2 different from what was requested of us, what was discussed
3 before Judge Seibel in November and she said no to, and what was
4 requested of us in December and that we all said no to.

5 If -- I think it would be helpful for us to be able to
6 respond to what Plaintiff's actually asking for if it's
7 different than what they asked for in November and December.

8 MR. BERG: Yeah, I'm happy to address that
9 (indiscernible).

10 THE COURT: Sure, go ahead.

11 MR. BERG: What we had offered was to work
12 collaboratively, that's the best way to do this, literally to
13 sit down together, and using Wave's photographs in electronic
14 form, compare them against Defendants' library, to see where
15 there's a match. I don't care if that is we give you our
16 photographs and Defendants do the search or we do it
17 collaboratively together or you give us your library and we'll
18 do it. That was the offer and still is the offer.

19 If we have to do it, with the Defendants' library in
20 our hands, we'll do it. If the Defendants are going to say,
21 "well, you wouldn't get that in discovery," then let's move to
22 another way to do it, which is for the Defendants to identify it
23 or to work together to identify closer to the universe of
24 infringements, as simple as that, and the answer was not -- was
25 no by most of the Defendants, that's absolutely true.

1 So, you know, putting the onus on us is fine, because
2 we're the Plaintiff and we're going to have to produce and
3 identify the infringement ultimately, but if there really were a
4 genuine desire to get your head around the universe of
5 infringement, one of the three options that I proposed, working
6 together, we do it with Defendant's library or they do it with
7 our library, those are -- those seem, to me, to be the most
8 efficient and best way for all parties to get these photographs
9 down off the internet and the infringement stopped.

10 MS. RAMORE: Mr. Berg, I -- again, this is Abigail
11 Ramore -- I do just want to clarify that your letter of
12 September 13th expressly set forth what you wanted and it was
13 only one of those, give us your entire library. As long as the
14 Defendants that are on this call are understanding that that's
15 not necessarily what your proposal is now, I think they can
16 evaluate it effectively.

17 And then just -- I also want to clarify and, again, I
18 apologize for sort of, for sort of taking over here, but I think
19 that it's helpful if we all understand what we're talking about
20 from the perspective of the distinction between the photograph
21 -- the universe of photographs and the universe of
22 infringements.

23 So as I understand it, the universe of photographs is
24 limited to photographs that were taken by or at the direction of
25 Wave of these hotels, and so that is narrow, right? That's that

1 -- and, again, please correct me, Mr. Berg, if I'm wrong, the
2 photographs are different than the infringements.

3 So the universe of photographs, not every photo that's
4 ever been taken of the Setai or whatever hotel it is by any
5 photographer ever or maybe I was a guest there and took it with
6 my iPhone, the universe of photographs is the universe of
7 photographs that are set forth in the registration. Is what
8 you're alleging -- what we're trying to get at here, I think, is
9 the universe of infringements of those photographs.

10 Is that an accurate characterization of where your
11 argument is as well? That there's a -- we know what the
12 universe of photographs is, but we don't necessarily know what
13 the universe of infringements is. Is that what Plaintiff's
14 alleging?

15 MR. BERG: Yes. We know the universe of photographs.
16 We have some idea on the Plaintiff's side of the universe of
17 infringement. We have the ability in any of the three options
18 that I gave, and I did speak to this, also, at the conference we
19 were -- we attended when I stood up and said you all can learn
20 right now, we can give you the list of hotels, we can deliver
21 the photographs and you can go back to your clients and search.
22 That was another option that we also gave. So the answer is,
23 the Defendants will make the universe more complete and that
24 will happen in discovery under any circumstances.

25 If we ask for libraries of photographs that the

1 Defendants have and we identify that they are our photographs,
2 that's discoverable, obviously. What I was trying to do in
3 moving this along and maybe settling with a bunch of the
4 Defendants so that we can minimize or reduce the number of
5 Defendants was to --

6 (Brief interruption)

7 MR. BERG: -- was to suggest ways principally to work
8 together to get to the universe of infringement and that's what
9 I've -- I was surprised to get a lot of resistance about,
10 frankly.

11 THE COURT: So, Ms. Ramore, Ms. Oakley, any or
12 Defendant, with that understanding, do the Defendants feel that
13 they want to confer and decide whether they would be amenable to
14 the Plaintiff's suggestion as part of settlement discussions for
15 them to deliver to Defendants electronically their photo
16 library, which was going to be part of what I was going to order
17 anyway, the asserted photographs, in a format that can be
18 searched or organized and then Defendants can search that
19 against their library of photos, so essentially it would be
20 working together to find matches and using it as a way forward
21 in settlement discussions.

22 Is that something that's still on the table as an
23 option?

24 MS. OAKLEY: This is Abigail --

25 MS. RAMORE: No, your Honor. This -- oh, I'm sorry.

1 I was going to defer to you anyway, so please go ahead.

2 THE COURT: Okay.

3 MS. OAKLEY: So this is Carla Oakley, and, no, your
4 Honor, that really just is not workable.

5 First of all, again, there's this misconception
6 regarding libraries. The real critical point here going back to
7 is we need to know what the Plaintiffs currently intend is an
8 alleged infringement, and that should be the starting point,
9 that is what Judge Seibel identified as the starting point, that
10 is where this discussion should start.

11 THE COURT: Right, and as I understood it, that was
12 identified in the spreadsheet of the master complaint, but the
13 URLs that were provided for you to see the screen shots or
14 whatever else was -- aren't workable so that you can't visually
15 see them, but at least in terms of text form, they've told you
16 that it was on this website on this date and this is the photo.

17 Is that right?

18 MS. OAKLEY: That's what they did, but that doesn't
19 help us because we can't actually see the photograph that's
20 alleged to be an infringement of, of the original, so if they
21 have it, they ought to provide it. It's as simple as that.

22 THE COURT: Right, but I guess what I'm wondering --

23 MR. BAUER: Your Honor, this is --

24 THE COURT: Go ahead, yep. Who is that?

25 MR. BAUER: This is John Bauer from ETG. I just want

1 to clarify -- you know, I have a transcript in front of me and I
2 want to underscore Ms. Oakley's point.

3 The issue that was squarely before Judge Seibel was
4 what was the burden on Wave to produce -- to prove its
5 infringement case, and, and on page 32, you know, line 22, THE
6 COURT: Well, they may know, referring to Wave, I'm sorry, to
7 the Defendants, what they have infringed, but what they really
8 want to know is what you think you can prove they infringed."
9 And from that, and what is consistent with that transcript, was
10 that the burden of proof was on Wave to bring a complaint in a
11 manner that allowed the Defendants to know what they infringed.

12 And what we subsequently heard from Wave, and what has
13 been reiterated by Wave today, is that somehow now the parties
14 should cooperate together, mainly that the Defendants now have
15 to basically engage in discovery and do a significant amount of
16 work to help Wave present its case, and I think that is the
17 pushback that Wave got in the correspondence between the parties
18 and the pushback that you're hearing today.

19 THE COURT: Okay. Understood. I think -- you know,
20 I've read the transcript as well, and I agree that the Court
21 expected the Plaintiffs to identify which photographs they're
22 claiming were used. And I -- but what I don't know is whether
23 the Court understood how complicated it seemed -- or, or to what
24 extent it wasn't going to be enough to provide the photos
25 themselves and identify the date of infringement and which

1 website, that that alone doesn't seem to be enough for, for the
2 Defendants to be able to identify the alleged infringement with
3 enough specificity it sounds like to me.

4 But I hear your point, I think I do agree that Judge
5 Seibel assumed that the burden was going to be on Plaintiff in
6 the first instance to identify that information.

7 MR. BERG: And --

8 THE COURT: So what I'm going -- what I think we need
9 to do is find out more information from the Plaintiff about how
10 these screen shots exist and in what form and the feasibility of
11 compiling that data so I can understand better whether it will,
12 in fact, take months and months to compile or that there's some
13 short circuit to that process to enable this to move forward
14 more efficiently.

15 So I'm going to move on to the next issue, which
16 unless you want to be here all day with me, but I actually some
17 other things to do, too, and I want to resolve this --

18 MS. MENKOVA: Your Honor, if you don't mind --

19 THE COURT: Yeah.

20 MS. MENKOVA: -- this is Anna Menkova for the Trip.com
21 Defendants.

22 I just want to make one more point, which is that the
23 2023 Defendants don't even have as much information as has been
24 provided in the master complaint. The master complaint just
25 points us back to the complaint in our 2023 action, so we would

1 certainly appreciate, you know, Plaintiff and your Honor working
2 together and figuring out how to get that information to us,
3 but, you know, we don't even have what was provided here and
4 also have the argument that there's no jurisdiction over our
5 Defendants.

6 So I just wanted to get those points in before we move
7 on. Thank you.

8 THE COURT: Sure. Thank you for that.

9 So --

10 MR. BAUER: One thing, your Honor, if I may, John
11 Bauer from ETG.

12 THE COURT: Yes.

13 MR. BAUER: It is my understanding that that master
14 complaint, master complaint supersedes the other complaints. Is
15 that correct? By Plaintiff?

16 THE COURT: I guess that's a question for Mr. Berg.

17 MR. BERG: I, I'm sorry, the question is whether the
18 master complaint supersedes the other complaint? It was not --

19 MR. BAUER: Correct.

20 MR. BERG: It does not technically supersede in a
21 strict, legal way. We were trying to put everything in one
22 place so that motion practice isn't unwieldy, so that's the
23 answer to that. But more importantly, the idea was to try to
24 make it all efficient. That, that's what we were going for with
25 the master complaint.

1 THE COURT: Okay. I want to just wrap up by trying to
2 figure out whether there's additional information that the
3 Defendants need in order for us to proceed with settlement
4 discussions. The additional asks that they had related to
5 Plaintiff identifying the specific photographs litigated in the
6 Singapore action.

7 Is that still something the Defendants believe they
8 need in order to proceed with settlement?

9 MS. OAKLEY: Yes, your Honor. This is Carla Oakley,
10 yes. And that should be easy.

11 THE COURT: Okay. And Plaintiffs, is that something
12 that you're unwilling to provide for some reason?

13 MR. BERG: No. It's not.

14 THE COURT: You can provide that.

15 MR. BERG: We've made the --

16 THE COURT: That would be helpful.

17 MR. BERG: I mean, they have a lot. They have the
18 vast majority of it in what we have delivered already. It's
19 just being a little...overstated what they think they don't
20 have. We did do what Judge Seibel asked us to do.

21 THE COURT: Okay. So that's, from your perspective,
22 is a non-issue. It's something that can be provided. I know
23 you dispute whether it's already been provided, but it's not an
24 issue that needs to keep us from talking about settlement.

25 MR. BERG: Yes.

1 THE COURT: The second request was Plaintiff to
2 provide the Singapore case settlement agreement. Is that
3 something that Defendants still feel they need absolutely to
4 proceed with settlement discussions, and why?

5 MS. OAKLEY: This is Carla Oakley. I'll jump in here
6 again and --

7 THE COURT: Okay.

8 MS. OAKLEY: -- take the lead. I guess I've been
9 nominated.

10 Yes, your Honor, we do believe that that would be
11 helpful and very simple to provide and something we would get.

12 For example, it avoids a situation where you have
13 double payments, it's important for us to know the scope of the
14 claims that were actually resolved, it's relevant to
15 understanding and having some context for the monetary payment
16 that was made, so, yes, we think it, it's quite relevant.

17 Plaintiff has said it involves the same photographs,
18 it's, it would be useful for the discussion purposes and we
19 request that it be produced.

20 THE COURT: Okay. So, Plaintiffs, is it something
21 you're unwilling to provide, and if so, why?

22 MR. BERG: So far we have been unwilling to provide it
23 simply because there's a confidentiality provision and that was
24 an important component to the settlement agreement, and
25 secondly, there's a dissent decree that gives the Defendants the

1 material information, and what I think I'm hearing is they just
2 want to be able to argue that the settlement as to GHM is a
3 settlement as to all. That's, I think, what they're really
4 driving at. And, obviously, that is going to be a heavily
5 disputed claim because it's -- the -- because it is going to be
6 a -- that's just not the case. We didn't settle with all
7 Defendants. And there are inconsistent letters that were
8 written by numerous Defendants, they were in a hurry to get to
9 trial, and now that we've prevailed, they're in a hurry to say,
10 "well, you prevailed, but GHM is all of us."

11 And that's going to be disputed and I think it's, it's
12 for another day. It shouldn't have anything to do with
13 settlement.

14 THE COURT: But I guess -- so the, so the first point
15 was confidentiality. The second was relevance, I guess. As to
16 confidentiality, is that still a hurdle? And whose
17 confidentiality?

18 I guess I read in the letters that at least -- was it
19 GHM? Who...

20 MR. BERG: Yes.

21 THE COURT: Waived that provision, so then that just
22 means the Plaintiffs haven't waived it.

23 MR. BERG: That's correct, and I'm not in a position
24 to say now that we can. I told, I believe it was Ms. Oakley,
25 that we were going to talk to our client about that, and we are

1 going to talk to our client about that, but I'm just not in a
2 position right this second to say anything else. I mean, we're
3 still discussing it.

4 THE COURT: Well, if you weren't able to provide the
5 entire settlement agreement, would be willing to provide at
6 least, you know, the relevant provisions about the scope of the
7 settlement, what claims were settled by whom and for how much.

8 MR. BERG: Well, they know how much. It's -- actually
9 nobody's asked us that, and I...need -- I need to think about it
10 and go back to our client with that. That may be doable, but
11 let me just -- let me ask. I think that's a little bit better
12 way, to ask for...

13 THE COURT: Right.

14 MR. BERG: What --

15 THE COURT: If I understand it, Ms. Oakley, it's
16 relevant how much was paid and whether or not -- what the scope
17 of the settlement covered, right? What the claims were, what
18 photographs, so the scope. Those are the key provisions, am I
19 correct, or are there other provisions that I'm missing that you
20 think would be relevant?

21 MS. OAKLEY: Those are the provisions that we can
22 imagine are in this agreement, but without seeing the agreement
23 in its entirety, and we are having a hard time appreciating or
24 understanding what could be so hotly confidential. We requested
25 this back in November and in -- and Mr. Berg has been saying

1 | since that November conference that he would talk to his client
2 | about it. It's been months. We haven't heard what is so
3 | incredibly sensitive and confidential that cannot be disclosed.

4 | THE COURT: Well, it sounds like he's thinking that
5 | you're -- that it's going to be used to argue that somehow this
6 | settles everything against everyone and there is no case?

7 | Is that what I'm hearing from you, Mr. Berg? Is that
8 | what you're concerned about?

9 | MR. BERG: It's not, it's not what I'm concerned
10 | about; it's what I know they're going to argue. Now, I think
11 | we're going to ultimately prevail on that, but that's, that's
12 | way down the line, and, you know, again, what your Honor's
13 | articulated is something a little bit -- is not the complete
14 | agreement being declared no longer confidential. Let me go back
15 | and deal with that.

16 | I've been working since November, we've been working
17 | since November, and talking about this issue, but we're not
18 | there yet and what your Honor suggested is a little different,
19 | and perhaps a little bit better in my view, and we'll go see if
20 | we can't do that, but the -- what you will hear, and I'm, I'm
21 | going to just be willing to bet we're going to hear this, is,
22 | well, GHM settled and we all settled and the photographs, as
23 | Judge Seibel rightly pointed out, if they're on your website
24 | today, then you're -- and she didn't say it this way, you're
25 | likely infringing, what else could it mean.

1 So, you know, that, that's -- let us go talk about
2 that, but it's not as critical to where we are now in our view.
3 It's just something they want so they can start making
4 arguments. That's all.

5 THE COURT: Okay. And, I guess, beyond
6 confidentiality, do you anticipate that you're going to resist
7 production of that in discovery altogether?

8 MR. BERG: I have no idea.

9 THE COURT: Okay.

10 MR. BERG: I just don't know.

11 THE COURT: Okay.

12 MR. BERG: I can't --

13 THE COURT: So let's move on to the -- I mean, the
14 last two issues, I think, are just Plaintiff to identify the
15 display-only infringers and to make a formal detailed settlement
16 demand.

17 So going back to that issue, Mr. Berg, you at the
18 outset suggested identifying the display-only infringers and
19 starting with them. How long -- and at some point along the way
20 at this conference, you mentioned 37 to 38 possible Defendants
21 fit into that category. How long would it take you to identify
22 the discipline-only infringers and provide that information to
23 the Defendants?

24 MR. BERG: Not long. We've been working on that,
25 we're making a lot of progress on it. I would suggest that if

1 we had a week and a half to two weeks, we could do that.

2 THE COURT: Okay. And then it -- similarly, how much
3 time -- would two weeks be sufficient to make a formal detailed
4 settlement demand to each Defendant? Along with identification
5 of the display-only infringers?

6 MR. BERG: Yes. It's one in the same -- the process
7 to determine those things is one in the same, and we're, we're
8 -- they're proceeding in parallel.

9 THE COURT: Okay. So here's what I think -- is there
10 anything else that I didn't cover in what the Defendants believe
11 they need in order to have settlement discussions proceed?

12 MR. HOGAN: Your Honor, this is Howard Hogan for
13 American Airlines. I don't think I'm going to add additional
14 information, but I want to make sure that we're all clear on a
15 piece of the puzzle that will be important for any settlement
16 discussions.

17 I can only speak for American Airlines, but I assume
18 many of the other Defendants are similarly situated, in that
19 American Airlines does not have a hotel booking service. It had
20 a website where other online travel agents could post, you know,
21 information in response to specific searches, so American
22 Airlines does not have a library of photographs or a database
23 that it can search. It relied on other Defendants.

24 The screen shots that have been produced to date in
25 some cases identify which of the online travel agents were at

1 issue and in some cases don't, so from the perspective of a
2 company that I think -- I can't confirm this, Mr. Berg maybe
3 knows better, I think American Airlines is a display-only
4 Defendant and should be treated as one, but we don't know which
5 other Co-Defendants we need to look for contribution or
6 indemnification without having the full library of screen shots
7 so that we know who was posting these photographs on our
8 website.

9 THE COURT: Understood. And the full library, is that
10 not one and the same with the electronic library that the
11 Plaintiffs said they would produce in electronic form?

12 MR. HOGAN: Yes, exactly. I believe that if they
13 produced the screen shots that they have, we can at least know
14 which, which other online travel agents were responsible for
15 posting the photographs.

16 I guess I raised it at this juncture because when we
17 talk about a schedule for having intelligent settlement
18 discussions with display-only Defendants, it's hard to do that
19 discussion in a vacuum for those of us who are the most
20 tangentially related to the display of these photographs.

21 THE COURT: I understand. So let me make sure I
22 understand your point.

23 Was -- is your -- because it seemed like it was
24 combining the electronic photo library and also the screen-shot
25 issue, which I thought were kind of separate. Am I right about

1 that? So what you were talking about is an electronic library
2 of the photographs which the Plaintiffs are going to provide.
3 Separately, you wanted screen shots of the alleged infringement.

4 Is that what you also need as part of this discussion?

5 MR. HOGAN: I was more focused on the screen shots,
6 because even if we get the library of their photographs, we have
7 no database to compare it to. The only thing we can do is look
8 at the alleged infringements.

9 I mean, if I go on American Airlines vacations today,
10 I can't find these photographs. I, I don't, I don't dis -- I'm
11 not disputing what Mr. Berg said earlier, maybe he's got a way
12 to, to do a search that will make them show up, but I couldn't
13 find them, and so knowing what exists is the only way a
14 display-only Defendant like American Airlines can find out who
15 else was involved in the display of the photograph.

16 THE COURT: Okay.

17 And, Mr. Berg, when it comes to this category,
18 display-only Defendants, that you're talking about, do you know
19 how many of them would probably be in the same position as
20 American Airlines, in the sense that they're sort of a step
21 removed from the process? Or is that --

22 MR. BERG: Yeah, I, I --

23 THE COURT: Go ahead.

24 MR. BERG: I think the answer's very few, but whatever
25 -- I'm sure once we get into negotiations with this subgroup

1 that we've been identifying today, I am sure we will become
2 laser focused on 37 Defendants instead of 90-plus and be able to
3 get whatever information is claimed not, not to be available,
4 along --

5 THE COURT: Okay.

6 MR. BERG: -- the lines of what's been discussed for
7 American Airlines once we get into this, but I think the
8 answer -- short answer is very few.

9 THE COURT: Okay, so here's what we should do. The
10 order of operations for us to proceed is for there to be a
11 meaningful exchange of information by both sides to allow the
12 parties to be in a position to get settlement authority,
13 evaluate their settlement position, and have settlement
14 discussions.

15 So the Plaintiffs indicated that they need information
16 about insurance coverage. Do any of the Defendants have a -- I
17 haven't had asked this, objections to providing that at this
18 stage? Under Rule 408.

19 MS. MENKOVA: Your Honor, the Trip.com Defendants,
20 they are all but one international Defendants and do, you know,
21 object to providing that insurance information when we don't
22 believe that there's jurisdiction over our clients in the first
23 place.

24 THE COURT: Okay. Anyone else? Okay.

25 So --

1 MS. OAKLEY: Your Honor, we're --

2 THE COURT: Go ahead.

3 MS. OAKLEY: -- we're just -- I'm sorry, this is Carla
4 Oakley. We're just going to need to double-check with our
5 clients on that.

6 THE COURT: Okay.

7 MS. OAKLEY: So we're not in a position, I'm sorry, to
8 say at this time.

9 THE COURT: Okay.

10 MS. PALLA: Your Honor, this is Sapna Palla for Qatar
11 Airways. We were just brought into this case last week. We
12 also need to check with our client.

13 MR. SHAPIRO: This is Sim Shapiro. Same.

14 MS. HOLLAND: This is Erica Holland for American
15 Express. The same.

16 (Indiscernible as multiple parties speaking
17 simultaneously)

18 THE COURT: Okay, all right.

19 MR. BAUER: This is John Bauer for ETG.

20 I think for all the Defendants, obviously we're not in
21 a position to make a decision on the record today, that we would
22 just need some time to confer with our clients.

23 THE COURT: Okay. I mean, my expectation -- you can
24 confer with your clients and explain to me the basis for why you
25 would object, but I don't see how you could have a strong basis,

1 because under initial disclosures rules, you're supposed to
2 provide information about insurance coverage just automatically,
3 so this isn't outside the scope of what you'd have to provide in
4 the early stages of discovery in any case and it's clearly
5 relevant to the Plaintiffs going forward, so the Court is
6 inclined to order the parties to provide this kind of
7 information to the Plaintiffs as part of moving forward in this
8 settlement discussion.

9 But I will allow the parties -- so I'll give the
10 parties, the Defendants, time to, you know, submit -- to confer
11 with their clients to determine whether this is an issue and
12 whether or not they want to object, and if they do object,
13 Defendants should submit a letter to the Court by March 7th,
14 which is one week from today, setting forth the business for
15 your objections to providing the relevant insurance coverage
16 information. Not hearing -- not having a letter received, I
17 will assume that the Defendants will produce that data to the
18 Plaintiffs by the end of next week, which is March 8th.

19 With respect to -- I'm going to put on hold...okay, so
20 the next issue of exchange, Plaintiffs are going to provide a
21 native version of the PDF spreadsheets that are attached to the
22 master complaint to the Defendants, along with the electronic
23 library of asserted photographs in a format that can be searched
24 or organized to all Defendants.

25 I -- so, Mr. Berg, can you confirm how long that would

1 take you to provide?

2 MR. BERG: Uh...let me just...if I can have two to
3 three weeks on that, I could -- I think I can get that done.

4 THE COURT: Okay.

5 MR. BERG: It may be sooner, I'm just -- I don't have
6 to give you the wrong date and not be able to comply.

7 THE COURT: Okay, so I'm going to set a deadline for
8 Friday, March 15th. If there is an issue with that for some
9 reason, then reach out to me and explain the basis for why you
10 can't do it by that date and propose an alternative in terms of
11 active links to or screen shots of the alleged infringements.

12 So, Mr. Berg, you're going to go back and figure out
13 what exists, in what format, and I want to know more, so will
14 you be able to provide me with that information -- or how long
15 do you think it would take to provide it to me? Is a week
16 enough time to figure that out or do you --

17 MR. BERG: Yeah.

18 THE COURT: So -- it is, okay, so I want you to get
19 back to me in a letter explaining what you've learned about the
20 active links to or screen shots of the alleged infringements by
21 Friday, March 8th, and we'll take it from there, once I see
22 what, what you say.

23 By...I think I'd like you to identify the specific
24 photograph litigated in the Singapore action to the Defendants
25 by March 8th. Is there an issue with producing it by then?

1 MR. BERG: It will be whatever that electronic library
2 that we supply will be...

3 THE COURT: It's, it's in that one, it's the same.

4 MR. BERG: Yeah.

5 THE COURT: One in the same? Okay.

6 MR. BERG: Mm-hmm.

7 THE COURT: And I can't recall just what date I told
8 you to produce that by. The 15th?

9 MR. BERG: Yes.

10 THE COURT: Okay. In terms of the --

11 MS. OAKLEY: With respect to -- I apologize. This is
12 Carla Oakley.

13 To be very clear, the Singapore action involved 2,381
14 photographs, and then there was a finding of infringement as to
15 242 photographs. What we are asking for is to know which of the
16 photos in the database --

17 (Brief interruption)

18 MS. OAKLEY: -- which of those photos in the database
19 constitute those 2,381 and which constitute the 242.

20 THE COURT: Okay. So I -- that's what I understood
21 Mr. Berg was going to be providing, so --

22 MS. OAKLEY: Okay.

23 THE COURT: -- did you have -- what were you referring
24 to, Mr. Berg? I mean, what I want you to do is identify the
25 specific photographs litigated in the Singapore action, which

1 | you said you could do. Is that not correct?

2 | MR. BERG: That's correct, but what Ms. Oakley said's
3 | a little different in that there are -- well, let me just say it
4 | this way, it'll be simple.

5 | What we provide in electronic form is what we believe
6 | was at issue in the Singapore case. How about that? I think
7 | that's the best and easiest way to say it. That's how I was
8 | thinking about it anyway.

9 | THE COURT: So you're saying that the entire library
10 | that you're going to produce is exactly what was litigated in
11 | the Singapore action?

12 | MR. BERG: That's correct.

13 | THE COURT: Okay. And so is there -- so, Ms. Oakley,
14 | do you have any response to that? I guess you're saying there's
15 | some -- what I understood is, there was a universe, but then the
16 | Court ruled on a subset of those.

17 | MS. OAKLEY: And so -- that --

18 | THE COURT: Go ahead, Ms. Oakley. So what you want to
19 | know --

20 | MS. OAKLEY: I'm sorry.

21 | THE COURT: -- is which of the -- what is the subset
22 | among the universe?

23 | MS. OAKLEY: So in the U.S. cases, the Plaintiffs have
24 | said there are 2,381 published photographs at issue and there
25 | are, I think it's 756 unpublished photographs at issue. What we

1 would like to -- and in the Singapore case, the decision talked
2 about 2,381 photographs. We would like to know which of the
3 3,000-plus supposedly at issue here in the US, which of those
4 are the two hundred -- 2,381 that were identified by the
5 Singapore court and also the 242 that were identified as
6 infringements.

7 THE COURT: Okay.

8 So, Mr. Berg, it sounds like your electronic database
9 will be broader and include more photographs than what were
10 litigated in the Singapore action, and so is -- will it identify
11 for the Defendants which of those were litigated in the
12 Singapore action specifically as well as the subset that the
13 Court found infringed?

14 MR. BERG: It's, it's two answers. The -- what was
15 litigated in Singapore was ownership over the entire three
16 thousand call it one hundred or 3,200 photos and ownership is
17 where we start. All of those were at issue in the Singapore
18 case.

19 As to the 242 that were found to be infringing as to
20 GHM alone, that's a subset that may require more time for us to
21 identify; I don't know, because I wasn't involved in the
22 Singapore, but what I can tell you is, when we deliver the 3,100
23 or two hundred photographs that were published and unpublished
24 that were at issue from our perspective in Singapore, that is
25 the universe at issue in this case. That's a starting point.

1 As to the subset of 242 infringements as to GHM alone,
2 I don't know if I can do that by the 15th, but I can certainly
3 try. It just seems unnecessary, I guess, is my point.

4 THE COURT: I guess I'm trying to understand why it
5 would be difficult. They didn't identify them by photograph or
6 registration number in some specific way so that you should be
7 able to know which they were? I mean --

8 MR. BERG: It's --

9 THE COURT: -- why -- I guess I'm trying to understand
10 why it's so com -- why it's complicated.

11 MR. BERG: No, I -- we can get that. I just don't
12 know if I can get that by the 15th, because I have to deal with
13 the Singapore file and figure out which 242 they are. I might
14 be able to do it, I just don't know. And it's not -- I'm not
15 trying to not give it to them, I'm just trying to make it so
16 that the timeline stays the same. And it's not --

17 THE COURT: Okay.

18 MR. BERG: -- clear to me why they would need that for
19 this purpose.

20 THE COURT: Okay.

21 Ms. Oakley, why -- is this really a gating issue? Why
22 do we need to get this before we engage further in settlement?

23 MS. OAKLEY: So the 242 is not quite as critical, but
24 it, it does seem to us that it should be both easy and is
25 critical to know out of the universe of the 3,000-plus that are

1 coming which ones are the 2,381 that were discussed in the
2 Singapore decision.

3 THE COURT: All right.

4 MS. OAKLEY: And that should be easy for them to do.

5 MR. BERG: That, that --

6 THE COURT: Okay, well, I think, for now, I'm going to
7 defer that.

8 I mean, because I think what may -- that -- I'd like
9 you to find out, Mr. Berg, what it would take for you to
10 identify that two-thousand-something subset that Ms. Oakley is
11 referring to, what work were to be involved, because it's not
12 clear to me yet whether that's -- how important that is for
13 purposes of moving forward in, in our discussions, but I'd like
14 you to look into that, and include that in the letter that
15 you're going to be sending to me when you look into the active
16 links and screen shots.

17 MR. BERG: I will do that, your Honor.

18 THE COURT: Okay.

19 And in terms of the settlement agreement, my proposal
20 is that Mr. Berg talk to his client and provide to the
21 Defendants the payment amount and the scope of the, the scope of
22 the settlement, what it covered, what claims, what photographs,
23 which I expect is some excerpt or certain paragraphs of the
24 settlement agreement, and that's what I would propose Plaintiffs
25 provide to the Defendants.

1 So I'm going to give you, Mr. Berg, an opportunity to
2 discuss that with your client and let me know your position, but
3 that's what I'm going to propose you provide, and you can
4 include that in the same letter that tells me about the active
5 links and screen shots.

6 I'm -- you're going to provide the Defendants with the
7 display-only infringers. I think you told me you would need two
8 weeks to do that? Is that right?

9 MR. BERG: Yes, at the --

10 THE COURT: Okay.

11 MR. BERG: -- outside, that -- yes.

12 THE COURT: So March 15th is what I want you to do,
13 provide that information. If it takes longer for some reason,
14 I'd like you to explain that to me, including why. And...let's
15 see.

16 Within...I guess by, by March 15th, will you be able
17 to provide a formal detailed settlement demand to each of the
18 Defendants?

19 (Brief interruption)

20 MR. BERG: To each of the 37 display-only or all of
21 the Defendants?

22 THE COURT: Well, let's start with the 37 to 38
23 display-only.

24 MR. BERG: Yes, as to that subset, we can by the 15th.
25 As to all Defendants, it sounds like we're, we're not in a

1 position to do that yet.

2 THE COURT: And you wouldn't be in a position because
3 you're saying you would need to do that sort of matching library
4 issue to get to the larger group?

5 MR. BERG: Yes, and to, to have everybody collaborate
6 to figure this out. That's one part of it. And another part of
7 it, it sounds like the Defendants need to get from us some of
8 this information and digest it.

9 So for those two reasons, I'm not sure we'll be in a
10 position to make demands on other Defendants that quickly.

11 THE COURT: Okay. So, I think, let's start there, so
12 by March 15th, you'll be able to provide detailed settlement
13 demands to that subset of display-only infringers, including the
14 rationale supporting your claim. Is that correct?

15 MR. BERG: Correct. Yes.

16 THE COURT: Okay, so let's start there.

17 And the next deadline -- so once the parties get that
18 March 15th demand, I think the Defendants indicated that they
19 would need a week to respond.

20 Does anyone believe differently? Assuming you get all
21 the information. Or do you think you'll need longer in light of
22 when the Defendant -- the Plaintiff will be producing the other
23 data to you?

24 MS. RAMORE: Your Honor, this is Abigail Ramore.

25 I think...it's a different answer for the Defendants

1 because not all the Defendants are going to be getting demands,
2 right? So --

3 THE COURT: Right, well, I'm talking -- I guess you're
4 right.

5 MR. BERG: Yeah.

6 THE COURT: I mean, I -- to the extent that -- let's
7 just -- you don't know yet who you are, display-only infringers.
8 I guess you could guess, so you're right, I guess I don't know.

9 So why don't we just start with the demand's going to
10 be made by March 15th. I am going to follow up after that date
11 with pre-settlement conference calls with each of the Defendants
12 to receive a demand, so my clerk will be in touch and we will
13 setup calls. They will be half-hour attorneys only, ex parte.
14 Plaintiff, I will do the same with you. So that I can get a lay
15 of the land and try to understand what makes sense and how best
16 to proceed.

17 So, Plaintiff, when you send out those settlement
18 demands, as part of your letter to the Court, I also want you to
19 identify who these display-only infringers are so I know who
20 receives settlement demands.

21 MR. BERG: Sure. Of course.

22 THE COURT: Okay. So I think we'll take it from there
23 and see where we are after you make your initial settlement
24 demands and whether and we'll talk among the various Defendants.
25 If necessary, I'll convene another conference like this one with

1 everyone so we can decide whether based on the information
2 provided, the parties are on board with moving forward with this
3 process, of display-only infringers versus some other method,
4 but to me, at this point, it seems like to get things moving, we
5 at least need to exchange some vital information and see where
6 we are.

7 Does anyone have any --

8 MS. RAMORE: Your Honor --

9 THE COURT: -- questions see where we are or anything
10 to add before we --

11 MS. RAMORE: Yes, your Honor. This is Abigail Ramore.
12 I apologize for interrupting.

13 I just want to make sure that even if the display-only
14 Defendants get separate demands, will the identity of the
15 display-only Defendants be disclosed to the group as a whole.

16 THE COURT: I assume that it would be. Yes.

17 MR. BERG: Yes. Yes.

18 THE COURT: That would be part of -- yeah, go ahead,
19 Mr. Berg.

20 MR. BERG: The letter -- I'm sorry. I don't mean to
21 interrupt, your Honor.

22 It'll be -- the Court's already said that the Court
23 wants to know who they are and so it'll be part of the March, I
24 think, 15th letter, if not, the March 8th letter, whichever one
25 is appropriate. We will let everybody know.

1 THE COURT: Okay.

2 Are there any other issues or questions that need to
3 be addressed? I'm almost afraid to ask at this point, but
4 anybody, this is your chance.

5 MR. SHAPIRO: Your Honor, this is Sim Shapiro. It's
6 possible I missed your Honor saying this. Am I correct that in
7 the meantime, with all this going on, any answer of the amended
8 complaint is stayed until --

9 THE COURT: Yes.

10 MR. SHAPIRO: -- further notice?

11 THE COURT: Yes. So Judge Seibel, as I understand it,
12 has put all of that on hold for now, no discovery, no motion
13 practice, no answers, while you all discuss settlement or at
14 least figure out if there's some subset of people who might
15 settle, and then she set a conference in April, potentially, to
16 talk over what's left or what's remaining.

17 She also indicated in her -- in, I guess, her
18 transcript or discussion with you all that if you need -- if
19 things are moving in the right direction and you need more time,
20 then she's happy to adjourn that April date, so there's room in
21 the schedule right now where she's seeing if we can make this
22 work, so...you're off the hook on any answers and motion
23 practice at this moment, with the focus, a laser focus, on
24 trying to see if some portion of this case can be settled or
25 resolved.

1 MR. SHAPIRO: Thank you, your Honor.

2 THE COURT: Sure.

3 Anyone else?

4 Okay, well, with that, then I'll enter a minute entry
5 which will set out the various deadlines that I mentioned in
6 this call, and then we'll take it from there. My hope is that
7 within a couple of weeks, we'll identify the best way to move
8 forward once you've shared some of this vital information to put
9 you in a position to have a meaningful discussion.

10 So we will adjourn for today. Thanks very much,
11 everyone.

12 ALL: Thank you, your Honor.

13

14 Certified to be a true and accurate
15 transcript of the digital electronic
16 recording to the best of my ability.

17

18 _____
19 Tabitha R. Dente, RPR, RMR, CRR

20 U.S. District Court

21 Official Court Reporter

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